

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT N. SALMON
Claimant

VS.

U.S.D. NO. 450
Respondent

AND

**KANSAS ASSOCIATION OF SCHOOL
BOARDS WORKERS COMPENSATION
FUND**
Insurance Carrier

Docket No. 1,017,642

ORDER

Claimant requested review of the April 20, 2006, Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on July 18, 2006.

APPEARANCES

Beth Regier Foerster, of Topeka, Kansas, appeared for the claimant. Anton C. Andersen, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found that claimant did not suffer a compensable injury to his right knee. The ALJ also found that claimant did suffer a compensable injury to his left knee and awarded him a 25 percent permanent partial impairment to his left lower extremity. The ALJ also ordered that Dr. Michael McCoy be

authorized to provide conservative care for claimant's left knee and that future medical will be considered under proper application.

Claimant requests that the Board modify the ALJ's award to include a rating of 10 percent to the left lower extremity for measurable atrophy in addition to Dr. Daniel Stechschulte's 25 percent permanent partial impairment rating to claimant's left lower extremity, which would result in a rating of 33 percent permanent partial impairment to the left lower extremity. Claimant also requests that the Board award claimant a 30 percent permanent partial impairment to the right lower extremity and combine that and the 33 percent permanent partial impairment to the left lower extremity, which would convert to a permanent partial impairment rating of 23 percent to the body as a whole. In the alternative, claimant requests that the Board find that claimant suffered a 37 percent permanent partial impairment of the left lower extremity and a 30 percent permanent partial impairment of the right lower extremity, which converts to a 25 percent permanent partial impairment to the body as a whole.

Respondent requests that the Board affirm the ALJ's finding that there was no work-related injury to the right lower extremity. Respondent also requests that the ALJ's award based upon a 25 percent permanent partial impairment to the left lower extremity be affirmed. Respondent, however, also argues that claimant's work-related injury has resolved and that any future medical would be related to claimant's preexisting arthritic condition. Therefore, respondent requests that the Board deny claimant future medical benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

At the time of claimant's injury, he was 57 years old and was the director of transportation at respondent. On August 28, 2002, claimant was checking on some new construction, and while he was walking across some uneven ground, he stepped on a dirt clod or piece of concrete and twisted his left knee. He felt a pop and a sharp pain. He did not fall but got his balance and continued walking.

On September 4, 2002, claimant went to the emergency room. An x-ray was taken of his left knee, which showed osteoarthritis with no acute injury. He was referred to Dr. John Gilbert, who in turn referred him to Dr. Brett Wallace. Dr. Wallace performed arthroscopic surgery on claimant's left knee on January 2, 2003. After the surgery, claimant's pain increased, and his left knee started to swell. He had fluid drawn out of his knee and had a series of three injections. Claimant eventually talked to Z. J. Shelton, a claims representative for respondent's insurance carrier. Ms. Shelton suggested that he

see Dr. Stechschulte and scheduled an appointment for claimant. Claimant testified that he also told Ms. Shelton during this conversation that his right knee was starting to hurt.

When claimant first saw Dr. Stechschulte, he told him about his right knee pain. However, they focused on the problems with his left knee. Claimant said that at later appointments, he and Dr. Stechschulte discussed his right knee. Claimant testified that Dr. Stechschulte watched him walk and corroborated that claimant was compensating for the pain in his left knee by not stepping down on the left knee, thus putting pressure on the right knee.

On November 29, 2004, claimant was walking outside to a shed on his property when he stepped on some ice and slipped. He did not fall to the ground. Later that afternoon, his right knee had swollen to about twice the size of the left one and was black and blue. He went to the emergency room, where he was told he had blood in his knee. It was claimant's understanding that the bleeding in his knee was the result of the Coumadin he was on for a previous heart event.

Claimant testified that he has limped with his left leg ever since his knee surgery. As the left knee continued to give him pain, he limped on his right knee as well. He does not remember if he told anyone at respondent that he was limping but assumed his co-workers saw him limp.

Claimant continued to work for respondent until March 15, 2004. He then went to work for Durham Transportation (Durham) as a transportation supervisor. While working for Durham, he was on his feet from four to six hours a day. He said that although being on his feet caused his knees to worsen, it was not as bad as it was when he worked for respondent. Claimant's testimony on this subject is ambiguous.

Q. (Claimant's Attorney): Do you believe that your job activities that you did after you left U.S.D. 450 in the year 2004, somewhere after March of 2004, has in any way worsened your left knee condition?

A. I believe it has. My left knee continues to worsen all the time. I can go somewhere between two and three months, depending on the pain, before I have to go back in and have it reinjected again.

. . . .

Q. Do you believe that the work activities you did at Durham, which is the job duties you did after you left 450, worsened your knee or was your knee being worse for some other reason?

A. No, Durham had absolutely nothing to do with that knee.

Q. Why do you say that?

A. Because it was continuing to get that way prior to my—before I even was employed with Durham.¹

Shirley Martin, claimant's supervisor at respondent, testified that at one time both she and claimant discussed that their knees were sore and achy, and both attributed it to age. She admitted she did not know when she had this conversation but thought it was several years before the 2002 injury. She did not recall that claimant missed any time from work related to his knees before August 2002. However, she recalled that she had a conversation with him sometime before August 2002 where he mentioned he had gone to his doctor and the doctor had sent him somewhere to get exercises to help strengthen his knees.

During the time claimant worked for respondent after his accident, Ms. Martin never heard him complain of problems with his right knee. She did not recall seeing him limp on his right knee. He never requested treatment of his right knee. Ms. Martin testified that she remembered claimant limping shortly after his surgery but does not remember that he continued to limp throughout the rest of the time he worked for respondent.

Ms. Martin has seen claimant two or three times after he left his employment with respondent. One time she saw him at a basketball game, and she watched him walk from the lobby area into the game. She did not think he knew she saw him, and she did not observe him limping. She saw him a second time at another basket ball game. They did not make eye contact, but he was sitting right in front of her and knew she was there. She watched him walking down some stairs, and he appeared to have difficulties.

Dr. Edward Wood is board certified in internal medicine and actively practices in that field. He is claimant's primary care physician. Dr. Wood testified that claimant complained to him several times about painful knees from 1991 through May 2002. On one occasion in January 1995, claimant reported to Dr. Wood that his knees were troublesome, were swollen, and "crinkled" when he would get up and about. Dr. Wood examined claimant's knees and found that the left one was warmer than the right, but he could not detect any prominent effusion or instability. At the time Dr. Wood was concerned about a possible tear or injury to the cartilage.

In May 2004, claimant saw Dr. Wood for soreness in the medial right knee. A vein study of claimant's leg showed a popliteal cyst which appeared to have ruptured. There was no evidence of effusion, and the range of motion in the knee appeared normal. A popliteal cyst is usually caused by wear and tear on the knee. In June 2005, Dr. Wood again saw claimant. At that time claimant complained of increased discomfort of the knees, with the right being worse than the left. Dr. Wood related claimant's problems to degenerative disease of the knees.

¹ Salmon Depo. at 25-26.

Claimant was referred to Dr. Daniel Stechschulte, a board certified orthopedic surgeon, by respondent's carrier. Dr. Stechschulte first saw claimant on December 4, 2003. At that time, he diagnosed claimant with severe arthritis of the knee. He and claimant discussed surgery, although he did not think it would benefit claimant. Dr. Stechschulte reviewed claimant's left knee x-ray taken on December 4, 2003, which showed that claimant had bone-on-bone in the medial aspect of his knee. His physical examination was consistent with the x-ray. Dr. Stechschulte referred claimant to physical therapy. On January 15, 2004, Dr. Stechschulte again saw claimant. Claimant told him that physical therapy had helped his knee, but his knee had gotten worse when he stopped the physical therapy.

Claimant last saw Dr. Stechschulte on February 26, 2004. He was still complaining of significant pain. Dr. Stechschulte told him his arthritis would only get worse and at some point he would require a knee replacement, but that he should put it off as long as he possibly could. At this point, Dr. Stechschulte determined claimant was at maximum medical improvement (MMI). He did not give claimant any restrictions.

Dr. Stechschulte stated that claimant definitely had preexisting arthritis in his knee, probably severe, and the injury and resulting surgery exacerbated his symptoms and arthritis. During claimant's arthroscopic surgery, some medial meniscus was removed, which predisposes people to arthritis in the compartment from which the meniscus was removed. Dr. Stechschulte opined that sometime after the surgery, claimant developed bone-on-bone. He also opined that a December 2003 x-ray of claimant's left knee showed a significant progression of disease from the x-ray taken in September 2002.

Dr. Stechschulte rated claimant as having a 25 percent permanent partial impairment to the left lower extremity based on the *AMA Guides*². He did not rate claimant based on his arthritis but on his assumption that claimant had no medial and lateral menisci. He testified that the exacerbation of claimant's arthritis was probably ratable. He stated that he would probably give claimant the same 25 percent rating for aggravation or exacerbation of his arthritis. However, if he was rating claimant strictly on his arthritis, then claimant would have a 50 percent permanent partial impairment to his left lower extremity. Dr. Stechschulte did not measure claimant's left leg for atrophy but said he was sure it was there. He did not rate claimant for the atrophy to his leg.

Dr. Stechschulte recalled claimant mentioning that he thought his gait was altered and that the altered gait was bothering his right knee. He never examined claimant's right knee, however, and had no opinion on whether claimant's limping aggravated any symptoms in the right knee.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Michael McCoy, a board certified orthopedic surgeon, first saw claimant on June 7, 2004. At that time, claimant was complaining about pain in his right knee. An x-ray taken that day showed degenerative arthritis of his right knee. Dr. McCoy gave claimant an injection in his right knee.

On November 29, 2004, Dr. McCoy treated claimant after his slip on the ice. At that time, claimant had blood in his knee. On December 28, 2004, Dr. McCoy aspirated claimant's right knee, and it had pure blood in it, which Dr. McCoy said was a complication of the Coumadin claimant was taking. Dr. McCoy gave claimant injections in both knees in March 2005 and again in June 2005.

Dr. McCoy opined that claimant's injury and surgery to the left knee aggravated or accelerated the arthritic changes to his left knee. He also did not think claimant's slip on November 29, 2004, caused him any permanent impairment of the right knee. He could not say how much, if any, of claimant's problem with his right knee was caused by his favoring his left knee and how much was because the knee was arthritic. Dr. McCoy said that because claimant favored his left knee, the right knee may hurt more and the symptoms may increase, but he did not think it aggravated anything. He opined that claimant's favoring of his left knee or limping did not cause any permanent change in the physical structure of the right knee.

Dr. Theodore Sandow, a retired board certified orthopedic surgeon, saw claimant on October 20, 2004, at the request of claimant's attorney. His report includes a detailed history of claimant's August 2002 accident and the subsequent treatment. In his physical examination of claimant, Dr. Sandow found a slight effusion in both knees, more on the right than the left. Measurements of the circumference of claimant's thighs showed 40.5 on the left and 42.5 on the right. There was tenderness over the medial and lateral joint lines on the left. There was pain in the left knee with both abduction and adduction strain of the left knee. Claimant had pain in his right knee with abduction strain. He walked with a limp. In a standing position, claimant had a significant varus of his knee and was essentially bowlegged. Dr. Sandow testified this was indicative of loss of the medial compartment cartilage. Dr. Sandow diagnosed claimant with a left medial meniscus tear and bilateral degenerative joint disease. Dr. Sandow concluded that claimant had preexisting degenerative joint disease in both knees which was asymptomatic until his injury. He also opined that claimant's work-related accident was the cause or substantial contributing factor of the left knee injury and necessary treatment. He also found that claimant's "left knee injury with the resultant surgery and subsequent weakness contributed to the onset of symptoms in the right knee."³

Dr. Sandow stated that claimant had reached MMI but would need total knee replacements on both knees sometime in the future. He also believed that claimant would

³ Sandow Depo., Ex. 2 at 6.

need further conservative treatment consisting of physical therapy and steroid injections for both knees.

Dr. Sandow rated claimant as having a 56 percent permanent partial impairment of the left lower extremity, which converted to a 22 percent permanent partial impairment to the body as a whole. In a letter to claimant's attorney, Dr. Sandow also rated claimant as having a 30 percent partial impairment of the right extremity, with half of that, 15 percent, being due to the fact that claimant was required to compensate for the symptoms in his left knee. A 15 percent impairment to the right lower extremity converted to a 6 percent impairment to the body as a whole. In total, Dr. Sandow rated claimant with a 27 percent permanent partial impairment to the body as a whole.

Dr. Sandow stated that the 30 percent rating to the right knee is attributed to a 1 millimeter measurement taken of the right knee. He agreed that did not correspond with the *AMA Guides*. Dr. Sandow explained that claimant also had a narrowing of his patellofemoral joint, which is why he gave a 30 percent rating instead of a 25 percent rating.

It is Dr. Sandow's opinion that the surgery to claimant's knee was a result of the August 2002 injury. Dr. Sandow testified that claimant's surgery accelerated claimant's need for a total left knee replacement. When Dr. Wallace did his surgery to claimant's left knee on January 2, 2003, in addition to repairing the meniscal tear he attempted to clean up some of the degenerative conditions. Those degenerative conditions would have been present before August 28, 2002. A lot of the cartilage in claimant's left knee was removed at the time of the surgery because it was abnormal, diseased cartilage. The accident was not the reason it was abnormal or diseased.

Dr. Sandow said he would expect that if a person walked four to five hours a day, seven days a week, that would cause stress on the knees of an individual who had osteoarthritis. In that circumstance, it would be natural to expect a faster progression of the problem. Dr. Sandow also stated that twisting or slipping on ice might hasten the progression of degenerative joint disease.

The Board finds that the ALJ's award should be modified to include the 10 percent impairment rating for atrophy to the left lower extremity. When combined with the 25 percent impairment for arthritic changes which were aggravated, accelerated, and made symptomatic by the accident and the menisectomy, the result is a 33 percent impairment to the leg.

Although the record establishes that claimant's right knee became symptomatic at least in part due to his favoring his injured left leg, the amount of any resulting permanent impairment has not been proven. Claimant's subsequent work activities and his November 29, 2004, accident likewise contributed to claimant's impairment. There is no expert medical opinion separating the resulting impairment in the right knee from these other

causes. In the absence of such testimony, it would be speculation for the Board to attempt to do so. Moreover, it is not clear that claimant's right knee problems rose to the level of a permanent impairment before his subsequent employment with Durham. Accordingly, the Board agrees with the ALJ's conclusion that claimant failed to prove his right knee injury occurred as a direct and natural consequence of his work-related left knee injury.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated April 20, 2006, is modified to award claimant a 33 percent permanent partial scheduled injury to the left leg.

The claimant is entitled to no weeks of temporary total disability compensation and 66 weeks of permanent partial disability compensation, at the rate of \$432.00 per week, in the amount of \$28,512.00 for a 33 percent loss of use of the leg, making a total award of \$28,512.00.

The Board adopts the other orders of the ALJ to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of July, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Beth Regier Foerster, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director